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Supreme Court, U.S.
FILED

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No. (1)

IN THE SUPREME COURT OF THE UNITED STATES

MINNIE L. SMITH,

Petitioner,

v.

OLIN CORPORATION d/b/a OLIN CHEMICALS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. **Can evidence of a longstanding and successful reasonable accommodation granted to an employee as to attendance be considered evidence that attendance is not an essential function of that particular job in the analysis of whether the employee is a qualified individual with a disability under the Americans with Disabilities Act?**

II. **Where the Defendant has been on notice of a potential claim throughout the life of a case, and the Plaintiff seeks to amend the Complaint to include that claim pursuant to Rule 15 (a), FRCP, is it an abuse of discretion for the Court to deny the request to amend without articulating a substantial reason for the denial?**

III. **In a retaliation case, can the proximity of the adverse employment action to a protected act in the analysis of causal connection run from the date of the latest identifiable protected activity, or must it always and only run from the earliest incident in which the employee opposed or reported discrimination, resulting in a lack of protection for following protected acts?**

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OPINIONS BELOW

The Court of Appeals for the eleventh Circuit issued an Order affirming the District Court's dismissal of this case on Summary Judgment on May 23, 2007. The Petitioner made a request for an extension to file this Petition for Writ of Certiorari, which was granted, giving the Petitioner until December 21, 2007, to file.

JURISDICTION

On May 23, 2007, the Appeals Court for the Eleventh Circuit affirmed the District Court's Dismissal of Ms. Smith's case upon the *Defendant's Motion for Summary Judgment*. This Court Has Jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

None.

STATE STATUTORY PROVISIONS AT ISSUE

None

STATEMENT OF THE CASE

Ms. Smith was hired to work for Olin Corporation (Olin) in 1976. It is undisputed that Ms. Smith is and was disabled as of the date of her original hire. Olin actually hired her, recognizing her status as an impaired and disabled individual, as part of an effort to promote equal opportunity by employing incapacitated or disabled individuals. For years after Ms. Smith's hire, Olin held her out to the Federal Government in its affirmative action reports (Olin was a government contractor and was required to make disclosures concerning affirmative action efforts) as a disabled employee. Ms. Smith's disabilities arose from a limited metal capacity (I.Q. of 81) and from being plagued by, at times, debilitating depression. Despite her underdeveloped mental capacity, Ms. Smith excelled at her job with Olin as a hygiene technician. Olin, recognizing that, infrequently, but inevitably, Ms. Smith would be

struck down by severe depressive episodes, would accommodate her by allotting her time off from work to recover. Because Olin was well aware of the nature of the illness afflicting Ms. Smith (and, in fact, benefiting from it as it made Ms. Smith a token disabled worker for it's affirmative action reports), Olin, for over twenty years, accommodated her with leave time, and with relaxed requirements for documentation of the reason for absences or precise projections of a return to work dates.

For about two decades, the relationship, and the reasonable accommodations afforded to Ms. Smith by Olin produced a more or less symbiotic relationship. Ms. Smith benefited in that she maintained continuous employment despite her disabilities. Olin was able to fulfill its affirmative action and equal opportunity employment obligations under its contracts with the Federal Government, while experiencing no detriment to the quality of work it received from

its employee (Ms. Smith). The record shows that, despite the absences, Olin gave Ms. Smith good work reviews, and produced no negative reports concerning her performance at all. This continued until Olin underwent some changes in its management personnel.

In the late 1990's Olin experienced a shift in supervisory personnel. Significant to this case was the appearance of Mr. Earl Hilson, who held several supervisory positions over Ms. Smith. From 1991, when Mr. Hilson appears to have come onto the scene with Olin, through the next eight years, Hilson climbed the corporate ladder successfully, rising to the position of manager of Olin's Augusta, Georgia plant in 1999. Prior to arriving "at the top" of plant management, Hilson had held several supervisory positions over Ms. Smith, and had become familiar with the reasonable accommodations with which Olin regularly provided for her. Once Hilson rose to that top position within the plant, he decided,

apparently, unilaterally, that Olin should no longer accommodate Ms. Smith and began a campaign to bring her "in line" with the rest of the employees at the plant.

Although there had been little change in the working relationship (with reasonable accommodations) between Ms. Smith and Olin, and the relationship had remained successful, Hilson took it upon himself to violate the old proverbial axiom "if it ain't broke, don't fix it," by insisting that Ms. Smith comply with the standard attendance policies. Olin began to increase demands for Ms. Smith to account for her time off, and for medical documentation of her condition. Ms. Smith accurately felt the steel corporate jaws of Olin's policies closing around her, and, foreseeably, began to panic and fret about her future with the company, leading to more frequent and more severe depressive episodes. The combination of Hilson's crusade to deny Ms. Smith special treatment, and Ms.

Smith's heightened anxiety were a predictable and inevitable recipe for disaster. As Hilson and Olin pressed her more and more fervently, she experienced more depressive symptoms, and was unable to come to work, causing, in turn, Hilson and Olin to pressure her with more vehemence.

Feeling cornered, Ms. Smith made internal complaints to Olin, and even filed an EEOC charge of discrimination, reporting that she was being denied reasonable accommodations and being discriminated against based on her status as a disabled person. Shortly thereafter, almost immediately, Hilson demanded that she provide doctor's statements covering her absences more often, even, than was required of the average Olin employee. For example, under Olin's policies, employees who were absent five days consecutively, were required to produce a "doctor's note" explaining the absence when returning to work. Hilson demanded that Ms. Smith produce medical documentation to

cover each and every day she was out. As the situation worsened after the EEOC charge, Ms. Smith resorted to hiring an attorney to intervene. Olin became aware that Ms. Smith had "lawyered up" on March 31, 2000. Ms. Smith then withdrew from the "battlefield," taking all her remaining vacation time, and applying for short term disability, based on her worsening depression.

She applied for Short term disability on May 3, 2000. Olin's short and long term disability policies were administered, at that time, by Liberty Mutual Insurance Company, which, under the plan, had the authority to make final decisions about applications for leave under the policy. The Plan Administrator granted Smith's request for leave and notified Smith by a letter dated May 8, 2000. After she had been granted the leave by the Plan Administrator, and within about five days of having heard from Ms. Smith's attorney, Hilson lept into action,

terminating Ms. Smith, and claiming to have voided the Plan Administrator's decision to grant leave to Ms. Smith. Hilson claimed that he terminated Ms. Smith for failure to return to work on May 4th , although she was, at the time, on a legitimate leave under the Plan's disability policy, per Liberty Mutual Insurance Company. Hilson then cut off Ms. Smith's disability insurance, and attempted to bolster his termination decision by claiming that he had terminated Ms. Smith prior to her application for the disability insurance. This was clearly untrue, as Ms. Smith made the application on May3rd, was granted leave by a letter from the pan administrator on May 8th. Olin presented two alternative dates on which it claims to have terminated Ms. Smith, May 5th and May 16th. Both asserted dates are obviously after the undisputed date of the application, which was filed on May 3rd. Olin and Mr. Hilson, despite the mathematical evidence of the dates, forced

the termination of Ms. Smith's leave retroactively and have continued to insist that Ms. Smith was not eligible on May 3rd to apply for disability insurance, since she had been terminated on May 5th. As a result, Ms. Smith was not only terminated, but was rendered unable to access short term and long term disability insurance benefits (long term benefits required exhaustion of short term benefits as a prerequisite) to which she would otherwise have had access, having been a plan participant for years.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER AN EMPLOYER'S ACTIONS IN GRANTING AN EMPLOYEE A REASONABLE ACCOMODATION AS TO ATTENDANCE COULD GIVE RISE TO AN ISSUE OF FACT AS TO WHETHER ATTENDANCE SHOULD BE CONSLUSIVELY CONSIDERD AS AN ESSENTIAL FUNCTION OF THE PARTICULAR JOB AT ISSUE FOR PURPOSES OF DECIDING WHETHER A DISABLED PERSON COULD BE CONSIDERD A QUALIFIED INDIVIDUAL WITH A DISABLITY UNDER THE AMERICANS WITH DISABILITIES ACT.

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER A COURT OVERSTEPS THE BOUNDARIES OF JUDICIAL DISCRETION BY DENYING A PETITIONER'S REQUEST TO AMEND THE PLEADINGS UNDER RULE 15(a), FRCP WITHOUT ARTICULATING A SUBSTANTIAL REASON FOR DOING SO.

THE COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DETERMINE WHETHER ANTI-RETALATION PROVISIONS, WHICH ALLOW FOR CAUSAL CONNECTION TO BE PROVEN BY TEMPORAL PROXIMITY, PROSCRIBE RETALIATION FOR ALL PROTECTED ACTS, OR JUST THE FIRST PROTECTED ACT IN A SERIES OF DISTINCT AND SEPARATE PROTECTED ACTIVITIES.

I. The District Court erred in taking the position that attendance is, as a matter of law, an essential function of any job, when there was evidence of a long-standing reasonable accommodation by the employer for the employee regarding attendance.

In a reasonable accommodation case under the ADA, the Plaintiff, as part of her burden of production and persuasion, must identify an accommodation that would allow her to perform the essential functions of her job, and must present evidence to establish that it is reasonable. Willis v. Conopco, Inc. 108 F.3d 282 (11th Cir. 1997). The

Court requires the Plaintiff in a reasonable accommodation case to actually produce *evidence* showing that the accommodation is reasonable. Id. At 287 Whether an accommodation is reasonable or not, then, is, at its heart, an issue of fact, and an essential element of the prima facie case. There are no limitations on how a Plaintiff may go about meeting this burden of evidence production. In this case, the employer had recognized the employee as disabled from the beginning of the relationship, and had been affording her the very accommodation at issue for decades, with no adverse effects on the business output or even on the employer's own continuing positive evaluations of the employee's performance. It seems that a reasonable person could conclude that the accommodation at issue was, in fact reasonable and not an undue hardship on the employer. If it had been an unreasonable thing to do, which wreaked havoc on the employer, then

why would the employer have agreed to do it, and happily granted the accommodation without complaint for decades? In this case, the District Court has simply rejected, out of hand, the concept that giving an employee time off could possibly, under any circumstances, ever be a reasonable accommodation because the Court sees attendance as an essential function of any job as a settled matter of law.

Although the petitioner does not argue against the fact that most courts have considered attendance to be an essential function of almost any job, it simply does not make sense to apply such a knee-jerk analysis when the employer, itself, has not only been participating in the reasonable accommodation of granting leave but has been actually benefiting from its actions by showing the Federal Government what a good employer it is with respect to accommodating disabled individuals. In addition, neither the business, nor the employee's performance record

suffered in any way from the employee having the time off. Some Circuit Courts have recognized that there are situations in which attendance may not be an essential function of a job. The Petitioner respectfully requests that the Court allow her to present, as an issue, whether or not an ADA Plaintiff may present evidence to rebut the presumption that attendance is necessarily always an essential function of any job. There are clearly some circumstances in which that outcome would not serve the interests of justice or and would obviate purpose of the statutory ant-retaliation protections designed by Congress when it created the ADA.

II. The District Court Judge overstepped the bounds of the Court's discretion by denying Ms. Smith's motion to amend her complaint without articulating a "substantial reason" for the denial.

It is undisputed that Ms. Smith did apply for short term disability benefits under a disability plan which was subject to the

Employee Retirement Income Security Act (ERISA). It is undisputed that Ms. Smith applied, under the plan, for short term disability benefits on May 3rd, that her application was accepted and considered (and ultimately granted) by Liberty Mutual Insurance Company, and that she was fired by Olin *after* her application. It is also undisputed that the plan administrator, Liberty Mutual Insurance Company, sent Ms. Smith a letter, granting her leave under the policy. Finally, it is undisputed that Olin had taken the position that, despite the fact that the Plan specifically names Liberty Mutual Insurance Company as the plan administrator, it (Olin) had the right to veto the administrator's decision and deny benefits to Ms. Smith arbitrarily and unilaterally. This seems to raise a very interesting issue of law, and one that is, admittedly not before the Court here. Does Olin's assumption of control over the decision making process subject it to suit under ERISA

for the denial? Ms. Smith never actually got to find out, because the trial court denied her attempt to amend the complaint to include the ERISA claim against Olin. Although the request was made a good way into the case, it is clear that Olin was aware of the conflict and had an opportunity to do discovery and defend its motives and reasons for denying the claim. After all, Ms. Smith had sued Olin claiming that the denial of the disability claim was retaliatory under the ADA. Olin defended by asserting that Ms. Smith was not eligible when she applied (on May 3rd) because she had already been terminated on May 5th. The issue of whether the decision to deny was supportable or was arbitrary would have arisen, also, in and ERISA suit.

Under the applicable federal rules, Rule 15(a), FRCP when a party seeks leave to amend the pleadings, "... leave shall be freely given when justice so requires." Although this seems to

imply discretion on the part of the Court, the Eleventh Circuit has issued at least one opinion noting that Rule 15(a), although granting discretion, severely curtails the breadth of that discretion:

"This policy of Rule 15(a) in liberally permitting amendments to facilitate determination of claims on the merits circumscribes the exercise of the trial court's discretion; thus, 'unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial.'"

Espey v. Wainwright, 743 F.2d 748, 750 (11th Cir. 1984).

In this case, the Judge, in denying Smith's motion to amend the pleadings, did not offer a substantial reason for the denial. It appears, from Rule 15(a), and from the generally accepted interpretation of its somewhat forceful insistence on liberally granting amendments, that the Trial

Court should be required, as part of the exercise of discretion in denying a Motion to Amend the Pleadings, to articulate a substantial reason for the denial, or risk being reversed for having overstepped the very limited breadth of discretion allowed under this particular rule. Such a finding by the Supreme Court would not only grant Ms. Smith a justice in this case, but would also be instructive and helpful to future trial practitioners and the judiciary alike.

III. The Court erred in finding that anti retaliation provisions of the Civil Rights statutes such as the ADA only protect the employee for retaliation from the first protected act of opposing or reporting discriminatory conduct of an employer.

Many of the statutes which were designed to require employers to abide by the principles of equal employment opportunity include or have been interpreted to include, anti-retaliation provisions. The Americans With Disabilities Act is no exception. The elements required make a

prima facie case of retaliation are similar if not identical among the statutes, and are relatively simple and straight forward. In order to prevail, the employee must show that she engaged in a protected act, that she has suffered an adverse employment action at the hands of the employer, and that there is evidence supporting a causal connection between the protected act and the adverse employment action. Farley v. Nationwide Mutual Insurance Company, 197 F.3d 1322 (11th Cir. 1999).

In this case, there is no question that Ms. Smith engaged in several actions which meet the definitional requirements of a protected activity. Filing a charge of discrimination with the EEOC is considered "participation activity." The definition of participation activity is usually adopted from the statutory language of Title VII. The participation clause protects an employee who has "made a charge, testified, assisted, or participated in any manner in an investigation,

proceeding, or hearing under this sub-chapter." 42 U.S.C. 2000e-3(a). Another type of protected activity is called "opposition activity," which may include a much broader scope of actions by the employee. Under the opposition clause, an employer may not retaliate against an employee because the employee "has opposed any practice made unlawful employment practice by this subchapter." Id.

Ms. Smith engaged both in participation activity (by filing a charge with the EEOC) and in opposition activity, by reporting discrimination to her supervisors, and by hiring an attorney to contact her employer with her complaints of discrimination. Under eleventh circuit law, an employee is considered to be engaging in protected "opposition activity" by hiring an attorney who contacts the employer on the employee's behalf about discriminatory practices. *See* Higdon v. Jackson, 393 F.3d 1211 (11th Cir. 2004).

Usually, in retaliation cases, when there has been participation activity, the participation activity occurred after the opposition activity. In other words, the employee began by reporting to her supervisors, and worked her way up to an EEOC charge. Ms. Smith did begin by making complaints to her supervisors that she experiencing discrimination and retaliation. Then she filed an EEOC charge. That occurred September of 1999. Apparently, however, that was not the final straw for Olin. As is relatively common, the EEOC charge being filed does not necessarily bring the discrimination to a screeching halt. In fact, most employers welcome a charge because most charges result in a finding in favor of the employer, especially with an unrepresented employee. On March 31, 2007, however, Olin was contacted by an attorney purporting to represent Ms. Smith, and who, obviously, was contacting the business in order to make some headway in resolving the

conflict, or to intervene on her client's behalf to curtail the discrimination that was occurring. This would be considered an opposition activity. Unlike the filing of the EEOC charge, the contact from a lawyer brought an almost immediate discharge and intervention from Olin, on May 5, 2000 disposing of Ms. Smith as an employee and violating the control rights of the Plan Administrator to deny benefits which had already been granted. The time lapse between the attorney's contact and the termination? About five days.

The Courts in almost every jurisdiction have recognized much longer spans of time (than five days) between a protected activity and an adverse employment action as close enough in temporal proximity to present evidence of causal connection. In this case, however, the District Court Judge did not find that five days was insufficiently close to prove temporal proximity. Instead, the Court chose to measure the time

span from the date of the EEOC charge to the termination, rather than from the date the attorney contacted Olin. That time span was about six or seven months. As is obvious from the example in this case, where temporal proximity is an issue, the choice of which protected act begins the measure of the time span can become the fulcrum for whether or not the record presents a prima facie case of retaliation.

Do the anti-retaliation provisions purport to protect an employee for just one protected act, or from any protected act? It seems to be clear, from the face of the statute, that the anti-retaliation provision is designed to proscribe retaliation against an employee for any protected act, not just the first one. To interpret the Act as protecting an employee only for the first complaint and then never ever again for any other kind of complaint simply negates the point of having an anti-retaliation provision. It also gives employers an incentive to do nothing after

receiving a complaint or EEOC charge, and to simply terminate the employee after a sufficient amount of time has passed, regardless of the employee's continuing complaints about workplace harassment or discrimination. The Petitioner requests that the Court consider allowing argument on the issue of whether temporal proximity in retaliation cases may be measured from the latest protected act. Such a ruling would not only serve the interests of justice in this case, but would protect the intent of the anti-retaliation statutes in all cases in which the employee has made more than one attempt to avail him or herself of the protections of Civil Rights Statutes such as the ADA.

CONCLUSION

For the reasons set forth above, Petitioner MINNIE L. SMITH, respectfully prays that the Court grant a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

Respectfully Submitted,

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No.

IN THE SUPREME COURT OF THE UNITED STATES

MINNIE L. SMITH,

Petitioner,

v.

OLIN CORPORATION d/b/a OLIN CHEMICALS,

Respondent.

APPENDIX

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APPENDIX
Rule 14(i)

Rule 14 (i)(i) Opinions, Orders, Findings of fact and conclusions of law entered in conjunction with the judgment sought to be reviewed

Order of U.S. District Court
October 16, 2006,. 1

Unpublished Opinion, 11th Circuit Court of
Appeals, May 23, 2007. 21

I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
GEORGIA
AUGUSTA DIVISION

MINNIE L. SMITH,	*
	*
Plaintiff,	*
	*
Vs.	*
	*
OLIN CORPORATION,	*
d/b/a OLIN CHEMICALS.	*
	*
Defendant,	*

ORDER

This employment discrimination case is before the Court on Defendant's motion for Summary Judgment. Upon consideration of the parties' brief, the record evidence, and the relevant law, the summary motion is GRANTED for the reasons stated below.

I. STATEMENT OF THE CASE

Plaintiff alleges that Defendant discriminated against her in violation of the Americans with Disabilities Act ("ADA"), 29 U.S.C. 12101, et seq. Plaintiff worked as a "Hygiene Technician"-- I.e., a laundress--at Defendant's mercury

hygiene plant from 1976 until 2000, when she was terminated. According to Plaintiff, she was originally hired by Defendant as part of an "affirmative action" program aimed at employing disabled individuals. (Pl.'s Br. In Opp'n at 1 (citing Pl's Aff.; Def's Produc. No. 00070-71; & Williams Dep. At 4-7, 10).) Plaintiff maintains that she is disabled due to severe depression and "lower than average I.Q."1 (Pl's Aff., pp 4-5.) According to the Plaintiff, Defendant violated the ADA by: (1) terminating her, (2) retaliating against her for filing an administrative charge by taking away previously afforded accommodations, and (3) "denying her short term disability, despite the fact that the short term disability had been awarded to her by the administrator of the program." (Pl.'s Br. In Opp'n at 4; see also Am. Compl., pp 26-27,29.)

In contrast, Defendant argues: (1) Plaintiff was fired because of her absenteeism, and not on account of any disability; (2) because job attendance is an "essential function," Plaintiff cannot show that she is a "qualified individual with a disability;" and (3) the fact that Defendant tolerated Plaintiff's excessive absences for many years did not give her a legal entitlement to such extraordinary treatment. (Def's Mem. InSupp. At 4-14.) Defendant also argues that Plaintiff was not eligible for Short term disability because she had already been terminated by the time her application was approved. (Def's Rule 56.1 Statement of undisputed facts at 12-13.)

1 to be more precise, Plaintiff has an I.Q. of "81." (Pl's Dep., Ex 7.)

II. BACKGROUND

Plaintiff, who has a seventh-grade education, was hired by Defendant on December 23, 2976. (Pl's Aff., p 5;Pl.'s Dep. At 23) At that time, Defendant knew that Plaintiff was participating in a "rehabilitation program intended to help individuals with mental and emotional problems."(Pl.'s Aff., p 2; see also Pl.'s Dep. At 24; Williams Dep. At 5.) Plaintiff suffers from chronic, recurrent depression. At times in the past, her condition has been so severe as to require hospitalization. (See e.g., Wallace Dep. At 10-11, 17 From 1993 until 1998, Plaintiff received psychiatric care from Dr. James Wallace. (Id. At 7.) Although Plaintiff eventually returned to Dr. Wallace's care, in March of 1998, she became dissatisfied with Dr. Wallace. (Id. At 15.)

From March 1998 until the fall of 1999, Plaintiff received psychiatric care from Dr. Jo Albritton. (Albritton Dep. At 9.) Until August 1999, it was Dr. Albritton's opinion that Plaintiff could perform her work "normally." (Id. At 16, 20-24,26,29,31,34,36,41,46). Furthermore, until August 1999, Dr. Albritton never advised Plaintiff to miss work, nor did Dr. Albritton ever provide Defendant with documentation excusing

any of Plaintiff's absences from work.(Id. At 34-36.)

On August 10, 1999, Dr. Albritton wrote a note stating that Plaintiff should be excused from work from July 26, 1999 until August 6, 1999. (Id.at 48) However, as Plaintiff was

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Not "in touch" with Dr. Albritton following this time, Dr. Albritton declined to write notes authorizing further absences. (Id. At 53,54-55,58,76) It should also be noted that Plaintiff was admitted to the hospital on August 11, 1999 for an overnight stay. (Id. At 61-62)

With regard to Plaintiff's condition in August 1999, Dr. Albritton offered the possibility that Plaintiff may have become confused (more severely depressed) because she was not following Dr. Albritton's directions regarding her medications. (ID. At 53-54,68-71; see also id. At 37-38,76,87-88.) Nevertheless, in Dr. Albritton's view, following Plaintiff's hospital stay, she was "medically able to work" no later than September 7, 1999. (Id. At 99) At any rate, because Dr. Albritton continued to refuse to provide further "work excuse[s]," Plaintiff terminated her relationship with Dr. Albritton. (Id. At 76.) Plaintiff then returned to Dr. Wallace's care. (Wallace Dep. At 29)

On March 7, 2000, Plaintiff called in and reported that she would not be in to work; Dr. Wallace subsequently faxed Defendant a statement indicating Plaintiff would return to work March 14, 2000. (Pl's Dep. At 188.) The

statement did not explain why Plaintiff needed to miss work. (Wallace Dep. Ex 8) On March 15, 2000, Dr. Wallace send Defendant a letter indicating that Plaintiff could return to work without restrictions. (Id. At 199; Pl.'s Dep., Ex. 4) Nevertheless, it is currently Dr. Wallace's view that Plaintiff is unable to work "in any kind of normal job situation." (Wallace Dep. At 78) Also of note, Plaintiff believes that she is "totally disabled," and provides that in March 2000 the Social Security Administration rendered a determination that she is disabled. (Pl.'s dep. At 13-15.)

Regardless of the specifics of Plaintiff's condition, it is undisputed that, throughout her employment with Defendant, Plaintiff missed "weeks" and even "months" of work each year. (Pl's Dep. At 37) According to Plaintiff, Defendant gave her "special terms" of employment on account of her disability. (Pl.'s dep. At 29) When Plaintiff decided she needed to miss work, she would simply "call in"; she was not required to explain her absences, give advance notice, inform Defendant when she would return to work, or obtain a doctor's note. (Pl.'s Aff., p10;Pl's Dep. At 35,38) In fact, Plaintiff was explicitly told that she would not be "penalized" for missing work. (Pl's Dep. At 32, 35) These "Accommodations" were granted verbally and were not memorialized in any way.(Id. At 32)

Despite her frequent absences, Plaintiff received "good reviews and regular raises" for

many years. (Pl's aff pp7,10) In fact, Plaintiff and Defendant had an amicable employment relationship for more than 20 years. (Pl's aff p 22) During this time, Plaintiff was not "held accountable" in any way for missing work. (Hilson Dep. At 16) For example, in 1996 Plaintiff admittedly missed more than 100

Days of work without a penalty. (Id. At 38) Each of these absences were paid. (Id.; see also Hilson Aff. P 4; Hilson Aff., Ex. A; Hilson Dep. Ex 3) In all, Plaintiff had a total of 176 paid absences between 1996 and August 1999. (Hilson Aff. Ex. A at 2) Plaintiff missed 114 days of work between January and August of 1999. (Id.)

Plaintiff poor attendance took a toll on the company, often requiring Defendant to make some last-minute arrangements to ensure that Plaintiff's duties were performed; in fact, Defendant was eventually forces to hire contractors to perform Plaintiff's job in her absence.2 (Hilson Aff., p 5) Following Plaintiff's erratic attendance in 1996, Defendant's attitude towards Plaintiff's absenteeism began to change. Although Mr. James Earl Hilson, the Administrative Services and Safety Manager at the plant, told Plaintiff that she could report to wok at any time of the day so long as she finished her work (see Smith Dep. At 39; Hilson Dep. At 2), Mr. Hilson also came to the conclusion that Plaintiff should no longer be exempted from Defendant's attendance policies. (Hilson Dep. At 16, 53)

In early 1997, Mr. Hilson decided to withhold merit pay increases and bonuses from Plaintiff on account of her poor attendance.

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2 Plaintiff does not dispute this fact. (See Pl''s Resp to Def's Statement of Undisputed Material facts at 2)

This is a typical course of action taken to hold employees accountable for absenteeism. (Id.) However, Human Resources Director Mr. Wayne Yonka reversed that decision, noting that it would be unfair to hold Playoff to a retroactive standard to which she had not been accustomed. (Id.) Nevertheless, it remained clear that Defendant would not longer tolerate Plaintiff's absenteeism.

According to Plaintiff, Mr. Hilson began making "new demands" of Plaintiff, "badgering" her, revoking her "special terms" of employment, and demanding that she provide a doctor's not when she missed work. (Pl.'s aff. Pp 13-16; See also Pl.'s Dep. At 46.) In short, in order for an absence to be excused, Plaintiff needed to provide medical documentation like any other employee. (Hilson Aff. Ex.3) However, Plaintiff continued her pattern of missing work without providing adequate medical documentation. (Hilson Dep. At 53)

After Plaintiff missed 22 days of work between may 20, 1999 and August 10, 1999 without providing any medical documentation (See Hilson Dep. P 7), Mr. Yonka sent Plaintiff a

letter informing her that Defendant would not continue to pay for her unexcused absences and that continued absences would subject her to "discipline." (Hilson Dep. Ex A at 3) Defendant also informed Plaintiff of its expectations during a meeting between Plaintiff and management. (Pl's Dep. At 126-29) The parties agree that, as of the time of the August

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1999 letter and meeting, Defendant did not regard Plaintiff as disabled. (Pl's Dep. At 154)

In the august 1999 letter, Defendant also imposed an attendance policy unique to Plaintiff. Citing Plaintiff's unpredictable absences, Defendant began requiring Plaintiff to provide "immediate medical documentation" for any absences. (Hilson Dep. At 48) Other employees had to produce a medical excuse only after a 5-day absences. (See id.; see also Pl's Aff. P 16) According to Defendant, this unique treatment was justified as "no other person in Augusta ha[d] been afforded this amount of paid time off without a valid, documented reason." (Hilson Dep. Ex 3 at 2)

In response to Defendant's new demands, Plaintiff filed an administrative complaint with the EEOC on September 16, 1999. (Pl's Aff. P 19; Pl's Dep at 19, 48) In her EEOC charge, Plaintiff contended that Defendant "discriminated against her by beginning to hold to "the same guidelines concerning absences as all other employees." (Pl.'s Dep. At 48,59,62) Regardless, Plaintiff then resumed her habit of

absenteeism, racking up 54 days of paid absences. (Hilson Dep. P9; Hilson Dep, Ex B; Pl's Dep. Ex 5)

On March 7, 2000, Plaintiff telephoned Defendant to say that she would not come into work. (Pl's Dep. At 188) Although no physician had instructed Plaintiff not to drive, Plaintiff did not believe she was able to drive to work. (Id.

At 191-92) Dr. Wallace subsequently faxed the statement referenced supra. As Dr. Wallace's statement did not explain why Plaintiff needed to miss work, Mr. Hilson called Plaintiff and asked her to come to the plant for an appointment with the company physician. (Id. At 188-91)

Plaintiff then missed work from March 7-10, 2000, without further contacting Defendant or meeting with the company physician as ordered. (Id. At 190, 193-94) On march 13, 2000, Plaintiff returned to work, where she met with management, including Mr. Hilson. (Id. At 194-95) Plaintiff informed Mr. Hilson that she did not intend to meet with the company physician. (Id. At 89-90)

On March 16, 2000, Defendant informed Plaintiff during a meeting with Mr. Hilson and via letter that her absences from March 7-10 would be unpaid, that Defendant was suspending her from a pay raise for six months, and that she would not receive "variable comp. pay." (Def's statement of Material Facts at 9 (citing Pl's Dep at 201-03; Pl's Dep. Ex 5).) Defendant also suspended Plaintiff for March 17-21, 2000. (Pl's

Dep. Ex 5)

Meanwhile, on March 15, 2000, Dr. Wallace sent Defendant a letter indicating that Plaintiff was able to work without restrictions; Plaintiff agrees that she was able to work as of that date. (Pl's Dep. At 1999-200; Pl's Dep. Ex 4) Nevertheless, Plaintiff proceeded to take the remainder of her vacation days, taking off the rest of March and April 2000.

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(Pl's Dep at 206-09) On April 26, 2000, Plaintiff informed Mr. Hilson that she did not intend to return to work. (Hilson Dep. At 68) On May 3, 2000, Plaintiff's vacation time expired and she applied for short-term disability. (Pl's Br. In Opp'n at 4; Pl's Dep. At 211, 222; Hilson Dep. At 65) According to Plaintiff, Defendant's ever-increasing demands for compliance with its attendance policies had caused Plaintiff's condition to deteriorate. (Pl's Br. In Opp'n at 3) Also, according to Plaintiff, she could not work under Defendant's general attendance requirements. (Pl's Dep. At 218-20)

On May 4, 2000, Mr. Hilson, unaware that Plaintiff had applied for short-term disability, called Plaintiff to ask if she would return to work. (Hilson Dep. At 67-68; Pl's Dep. At 220; see also Hilson Dep. At 65-66,78) Plaintiff responded only by telling Mr. Hilson that her lawyer would be in touch. (Pl's Dep. At 214, 220,221) On May 5, 2000, when Plaintiff failed to return to work, Mr. Hilson sent Plaintiff a letter informing her that she had been

terminated. (Hilson Dep. Ex 9) On May 8, 2000, Liberty Mutual Insurance Company, the administrator of Defendant's short-term disability program, sent Plaintiff a letter informing her that her request for disability benefits had been granted. (Pl's Aff. Ex 1) However, because Plaintiff had been discharged before her request was approved, Defendant ultimately refused to authorize the grant of short term disability.

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III. REQUIREMENTS FOR SUMMARY JUDGMENT

The Court should grant summary judgment only if "there is no genuine issue as to any material fact and... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts are "material" if they could affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court must view the facts in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), and must draw "all justifiable inferences in [ist] favor," United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc) (internal punctuation and citations omitted).

The moving party has the initial burden of showing the Court, by reference to materials on file, the basis for the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). How to carry

this burden depends on who bears the burden of proof at trial, that party "must show that, on all the essential elements of its case, ... no reasonable jury could find for the non-moving party." Four parcels, 941 F.2d at 1438. On the other hand, if the non-movant has the burden of proof at trial, the movant may carry the initial burden in one of two ways-- by negating an essential element of the non-movant's case or by showing that there is no evidence to prove

A fact necessary to the non-movant's case. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 606-08 (11th Cir. 1991) (explaining Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Before the court can evaluate the non-movant's response in opposition, it must first consider whether the movant has med its initial burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Jones v. City of Columbus, 120 F.3d 248, 254 (11th Cir. 1997) (per curiam). A mere conclusory statement that the non-movant cannot met the burden at trial is insufficient. Clark, 929 F.2d at 608.

If -- and only if-- the movant carries its initial burden, the non-movant may avoid summary judgment only by "demonstrating that there is indeed a material issue of fact that precludes summary judgment." Id. Again, how to carry their burden depends on who bears the burden of proof at trial. If the movant has the

IV. DISCUSSION

A. Determination

In order to establish a prima facie case of discrimination under the ADA, a plaintiff must show that (1) she has a disability; (2) she was a qualified individual; and (3) she was discriminated against because of her disability. Carruthers v. BSA Adver., Inc., 357 F.3d 1213, 1215 (11th Cir. 2004); Gordon v. E.E. Hamm & Assoc., 100 F.3d 907, 910 (11th Cir. 1996). Because Plaintiff cannot establish a prima facie case, Defendant is entitled to summary judgment as to the plaintiffs claims of discrimination.

Assuming arguendo that Plaintiff has a disability, Plaintiff's claims fail because she was not a qualified individual. An individual is qualified if she is able to perform the "essential functions" of the job with or without reasonable accommodation. D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1226 (11th Cir. 2005). Thus, at issue here is whether Plaintiff could perform the essential functions of her job as a laundress.

"'[T]he term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires,'" and "'does not include the marginal functions of the position.'" Id. At 1230 (quoting 29 C.F.R. 1630.2(n)(1)). In this regard, Defendant argues that Plaintiff was not a qualified individual because she was unable to perform the essential function of regular job attendance. (Def's Mem. In Supp. Of Mot. For Summ.J. at 6) The Court agrees. It is undisputed

that Plaintiff's attendance at work was erratic from 1996 until her termination in 2000. Plaintiff herself admits that she could not "report

And document and attend regularly." (Pl's Br. In Opp'n at 9)

The Eleventh Circuit has held that "regular attendance is an essential function of a housekeeping aide job, noting that '[u]nlike other jobs that can be performed off site or deferred until a later day, the tasks of a housekeeping aide by their very nature must be performed daily at a specific location.'" Earl v. Mervyns, Inc., 207 F.3d 1361, 1366 (11th Cir. 2000) (quoting Jackson v. Veterans Admin., 22 F.3d 277, 279 (11th Cir. 1994)). Despite Plaintiff's argument to the contrary, her position as Hygiene Technician is analogous. Defendant's plant operations depended upon the Plaintiff's laundering duties begin performed onsite on a "daily basis." (Hilson Dec. Ex A at 3.; see also Hilson Dec. pp 3,5.) Plaintiff admits that when she missed work, often with little or no notice, Defendant was forced to assign her work to other employees or obtain the help of contractors.

The ADA does not require an employer "to reallocate essential job functions." Holbrook v. City of Alphretta, Ga., 112 F.3d 1522, 1527 (11th Cir. 1997) (quotation omitted); see also Epps v. City of Pine Lawn, 353 F.3d 588, 593 n.5 (8th Cir. 2003) ("An employer is not required to hire additional people or assign tasks to other employees to reallocate essential functions that

an employee must perform.") Of note, the fact that Defendant was able to "cover" for Plaintiff during her absences does not show that her erratic

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Attendance did not prejudice Defendant. See Brenneman v. MedCent. Health Sys., 366 F.3d 412, 420 (6th Cir. 2004). Rather, the evidence shows that, during Plaintiff's paid absences, Defendant had to reallocate her work to other employees or hire a contractor to perform her essential duties. That Defendant tolerated this situation for so many years is truly extraordinary.

Put plainly, the instant case does not present the usual scenario (such as when eh job can be performed at home or without regard to any time constraint) in which regular on-site attendance is not an essential function.3 Consequently, the Court rejects Plaintiff's argument that regular attendance was not an essential function of her job. Similarly, the Court also rejects Plaintiff's argument that because Defendant "accommodated" her absenteeism in the past, it is "stopped" from claiming that such accommodation

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3See Tyndall v. Nat'l Educ. Ctrs., Inc. of California, 31 F.3d 209, 213 (4th Cir. 1994) ("Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee 'who does not come to work cannot perform any of his job functions,

essential or other wise.'"); see also Mason v. Avaya Communications, Inc., 357 F.3d 1114, 1119 (10th Cir. 2004) ("[P]physical attendance in the workplace is itself an essential function of most jobs."); Devito v. Chicago Park Dist., 270 F.3d 532, 534 (7th Cir. 2001) ("Regular attendance is an essential requirement of a job."); Davis v. Florida Power & Light Co., 205 F.3d 1301, 1306 (11th Cir. 2000) (explaining that "job presence" is an essential function); Nesser v. Trans World Airlines, Inc., 160 F.3d 442, 445 (8th Cir. 1998) (Attendance at work is a necessary job function."); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1047 (6th Cir. 1998) ("An employee who cannot meet the attendance requirements of the job cannot be considered a 'qualified' individual protected by the ADA.") Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996) ("Because [the plaintiff] could not attend work, he [was] not a 'qualified individual with a disability' under the ADA."); Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994) (coming to work regularly is an "essential function").

Is reasonable or that regular attendance is an essential job function. The existence of "prior accommodations do[es] not make an accommodation reasonable." Eood v. Green, 323 F.3d 1039, 1314 (11th Cir. 2003) Citing Holbrook, 112 F.3d at 1528). In other words, Defendant correctly argues that when an employers past accommodations have "exceeded

that which the law requires," a "decision to cease making those accommodations that pertained to the essential functions" of the job does not violate the ADA. *Holbrook*, 12 F.3d at 1528. Simply put, Defendant's decision to end its tolerance of Plaintiff's demand for weeks and even months of paid absences each year -- often without advance notice, medical documentation, or any indication when Plaintiff would be able to return to work -- did not constitute unlawful discrimination under the ADA.4 In sum, Plaintiff has failed to make a prima facie case of discrimination because she was not a qualified individual.

B. Retaliation

Next, the Court addressed Plaintiff's retaliation claims. In order to prove an ADA retaliation claim, Plaintiff must show: "(1) [she] 'engaged in conduct protected by the ADA'; (2) [she] 'was subjected to an adverse employment action at the time, or after the protected conduct took place'; and (3)

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4 of note, the Eleventh Circuit has explicitly held that it is not reasonable for an employee to demand an "accommodation of indefinite leaves of absence so that [she] should work at some uncertain point in the future." Wood, 323 F.3d at 1314.

The defendant 'took an adverse employment action against [her] because of [her] protected conduct.'" Collado v. United Parcel Service, Co.,

419 F.3d 1143, 1158 (11th Cir. 2005) (citation omitted). Plaintiff argues that Defendant retaliated against her by taking away accommodations, terminating her, and denying her short-term disability. 5 (Pl's Br. In Opp'n at 11) None of these claims survive summary judgment.

First, Defendant took away its "accommodations" and began working to ensure Plaintiff's regular attendance before Plaintiff filed her EEOC complaint in September 1999. Indeed, Plaintiff filed her administrative claim in responses to Defendant's decision to require her to adhere to its attendance policies. Furthermore, Mr. Hilson began requiring Plaintiff to provide medical documentation for any absence in August 1999, before Plaintiff filed her EEOC charge. (Hilson Dep. At 47-48.) Because these actions predated the protected conduct (filing an EEOC charge), they cannot be considered retaliation. Collado, 419 F.3d at 1158-59. More to the point, Defendant has produced evidence that its actions were aimed at securing either regular attendance from Plaintiff or adequate medical documentation to excuse her absences. Defendant took no even arguably adverse action until after

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5 in this regard, it should be noted that Plaintiff does not argue that she sought short-term disability as an accommodation -- indeed, as noted supra, in April of 2000, Plaintiff informed Defendant that she had no intention of ever

returning to work.

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Plaintiff missed an astonishing 100 days of work in 1996. Plaintiff has presented no evidence that Defendant's rationale was discriminatory, retaliatory, or pretext for some other invidious motive.

As to Defendant's decision to terminate Plaintiff, this decision was not made until May 2000, several months after Plaintiff had filed her EEOC complaint and only after Plaintiff had announced her intention not to return to work, exhausted her vacation time, and then refused to return to work. Of note, Plaintiff took these actions in spite of her doctor's statement to Defendant that she could return to work. There is no basis for Plaintiff's contention that her termination was in retaliation for her EEOC charge of September 199 or any other protected activity. Nor can the termination be viewed as retaliation for Plaintiff's application for short-term disability, and Mr. Hilson was unaware of Plaintiff's application at the time he made the decision to terminate her.

Finally, there is no evidence to support Plaintiff's contention that she was denied short term disability in retaliation for protected conduct. Rather, Plaintiff was denied short term disability because she was terminated prior to the approval of her application. In sum, Plaintiff has failed to make a prima facie case of discrimination or retaliation under the ADA.

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V. CONCLUSION

For the aforementioned reasons, Defendant's motion for summary judgment is GRANTED. The Clerk is directed to ENTER FINAL JUDGMENT in favor of Defendant and CLOSE this case. Costs are taxed against Plaintiff.

ORDER ENTERED at Augusta, Georgia, this 16th day of October, 2006.

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United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-15830

D.C. Docket No. 01-00137-CV-1-DHB

MINNIE SMITH,

Plaintiff-Appellant,

Versus

OLIN CORPORATION,
d/b/a Olin Chemicals

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Georgia

(May 23, 2007)

Before PRYOR, KRAVITCH and ALARCON,
Circuit Judges.

PER CURIAM:

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* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

After careful consideration of the record and the written and oral arguments of the parties, we conclude that summary judgment was properly granted in favor of Olin Corporation. We affirm based on the well-reasoned opinion of the district court.

AFFIRMED.